



## Assessment of Contested Expert Medical Evidence in Medical Negligence Cases: A Comparative Analysis of the Court's Approach to the *Bolam/Bolitho* test in England, South Africa and Singapore

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### Abstract

*There are matters which simply cannot be decided without expert guidance. Expert evidence is therefore readily received on issues relating to, for example, ballistics, engineering, chemistry, medicine, accounting and psychiatry. Expert evidence amounts to an opinion of the expert witness and it would be admissible in a trial if it is relevant and if facts on which the expert's opinion is based are established. When evaluating the evidence, inferences may be drawn and probabilities may be considered and such inferences and probabilities must be distinguished from conjecture or speculation. There must be proven facts from which the inference can be drawn and there should not be speculation as to the possible existence of other facts. In medical negligence cases, the courts in England, South Africa and Singapore purport to apply the Bolam/Bolitho test when evaluating the evidence. This test requires that the court, when assessing the conflicting expert evidence to determine negligence, must allow for the difference in opinion between experts and that it is a sufficient defence that the conduct is in accordance with a practice accepted by a responsible body, regardless of the size of that body. The court must further determine whether the conduct is responsible or logical. The article will evaluate the approach of civil courts in evaluating conflicting expert medical evidence in medical negligence cases. The article will focus on the courts' approach in England, South Africa and Singapore. This will be done to determine best practice.*

**Keywords:** Medical negligence; expert evidence; conflicting expert opinion; Bolam test; Bolitho test.

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## 1 INTRODUCTION

There are matters which simply cannot be decided without expert guidance.<sup>1</sup> Expert evidence is therefore readily received on issues relating to, for example, ballistics, engineering, chemistry, medicine, accounting and psychiatry.<sup>2</sup> In other cases expert evidence, though not absolutely necessary, would nevertheless still be of use.<sup>3</sup> Knoetze-Le Roux acknowledges the importance of expert evidence and the author points out that expert witnesses are of assistance to courts in cases where the court is unable to make a decision, because of lack of specialised knowledge.<sup>4</sup>

Expert evidence amounts to an opinion of the expert witness and it would be admissible in a trial if it was relevant and the facts on which the expert's opinion is based are established.<sup>5</sup> But no hard-and fast rule can be laid down and much will depend on the nature of the issue and the presence or absence of an attack on the opinion of the expert.<sup>6</sup> Schwikkard and Van der Merwe argue that in extreme cases where expert evidence can be so technical that the court is not in a position to follow the exact reasoning of the expert, the court will place great emphasis on the general repute of the witness's profession and the absence or presence of possible bias.<sup>7</sup>

When evaluating the evidence, inferences may be drawn and probabilities may be considered and such inferences and probabilities must be distinguished from conjecture or speculation.<sup>8</sup> There must be proven facts from which the inference can be drawn and there should not be speculation as to the possible existence of other facts.<sup>9</sup> These are general principles applicable to the evaluation of evidence in general, including expert evidence.

It may be, as it is the case in most matters, that the expert witnesses provide conflicting opinions on various aspects of the case. Having considered the general principles, how does the court decide which expert opinion to accept and which to reject? Visser and Kruger argue that although our courts have developed principles in evaluating conflicting expert evidence, more guidance is required where both expert opinions are supported by logical reasoning.<sup>10</sup> Visser and Kruger further argue that in South Africa, there are few directives to help judges solve the problem of conflicting expert opinions.<sup>11</sup>

In the context of conflicting expert medical evidence in medical negligence cases, English courts have adopted the *Bolitho* test together with the *Bolam* test. In *Michael v Linksfield Park Clinic (Pty) Ltd*,<sup>12</sup> the South African Supreme Court of Appeal accepted the application of the *Bolitho* test when deciding on conflicting medical expert evidence in medical negligence cases. South Africa is not the only country that has adopted the *Bolitho* test in medical negligence cases. Courts in Singapore apply the *Bolam* test with the *Bolitho* "addendum" in medical negligence cases and more specifically in respect of conflicting expert medical evidence.

This contribution will evaluate the approach of civil courts in evaluating conflicting expert medical evidence in medical negligence cases. The focus will be the court's approach and this will be done through evaluating various judgments on the subject. The contribution will conduct a comparative analysis of the position in England, South Africa and Singapore. All these jurisdictions have relied on the *Bolam/Bolitho* test in assessing expert medical evidences. This will be done in order to determine whether there are any lessons that could be drawn from

1 Schwikkard and Van der Merwe *Principles of Evidence* 4 ed (2016) 99.

2 *Ibid.* This is not an exhaustive list.

3 *Ibid.* Intoxication and handwriting are two examples.

4 Knoetze-Le Roux "Ways to Curb Expert Bias" 2017 *De Rebus* 37.

5 *PriceWaterhouseCoopers Inc v National Potato Co-operative Ltd* 2015 2 All SA 403 (SCA).

6 Schwikkard and Van der Merwe *Principles of Evidence* 103. The authors also argue that the opinion of an expert must be ignored — and should strictly speaking be considered inadmissible — if it is based on some hypothetical situation which has no relation to the facts in issue or which is entirely inconsistent with the facts found proved. As an example, this is a frequent problem where a psychiatrist relies solely on an accused's version of the events in assessing his or her mental condition for purposes of determining criminal responsibility. See also *S v Ramgobin* 1986 (4) SA 117 (N) 146; *S v Mthimkulu* 1975 (4) SA 759 (A); *S v Claassen* 1976 (2) SA 281 (O).

7 Schwikkard and Van der Merwe *Principles of Evidence* 104.

8 *Sali v S* (CA&R 199/2014) 2015 ZAECGHC 20 (18 March 2015).

9 See *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 3 All ER 722 733. See also *Katz v Katz* 2004 4 All SA 545 (C) and *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting* 2002 3 SA 765 (T) 781A-C.

10 Visser and Kruger "Revisiting Admissibility: A Review of the Challenges in Judicial Evaluation of Expert Scientific Evidence" 2018 *SA Journal of Criminal Justice* 1.

11 *Ibid.*

12 2001 3 SA 1188 (SCA).

these jurisdictions for South Africa and to establish best practice regarding the interpretation of the *Bolam/Bolitho* test.

A survey of case law in England will be followed by evaluating courts' approach in South Africa and Singapore. However, in order to provide a comprehensive discussion of this subject, a brief discussion of the need for expert evidence that may be necessary to sustain a cause of action or defence in medical negligence cases in South Africa, is required.

## 2 MEDICAL NEGLIGENCE AND THE NEED FOR EXPERT EVIDENCE

The discussion on how the court should assess the expert evidence should be done in the context of the necessary elements that need to be proved. In the context of South Africa, our courts have on, a number of occasions, dealt with this issue. In *Van Wyk v Lewis*,<sup>13</sup> applying *Mitchell v Dixon*,<sup>14</sup> the court found that the test required to determine the negligence of a medical practitioner is to determine whether the medical practitioner breached his duty to employ reasonable skill and care. The medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care.<sup>15</sup> In deciding whether the conduct is reasonable, the court will have regard for the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.<sup>16</sup> This is in line with the decision in *Kruger v Coetzee*,<sup>17</sup> where the court found that the possibility should have been foreseen but also that there were reasonable steps which should have been taken to avoid the damage before a party is said to be negligent. The ordinary medical practitioner should exercise the same degree of skill and care regardless of where he conducts his duties.<sup>18</sup>

In *Blyth v Van der Heever*,<sup>19</sup> the court found that there are two questions that must be asked in medical negligence cases. First, what factually was the cause of the ultimate condition of the patient? Secondly, did the negligence on the part of the medical practitioner cause or contribute to the damage suffered? The second question requires determining whether the medical practitioner failed to exercise reasonable professional care and skill and whether the exercise of reasonable professional care and skill could have prevented the condition of the patient.<sup>20</sup> This means that where a medical practitioner acted as a result of an error but having exercised reasonable professional care and skill required, such person will not be liable.<sup>21</sup> A medical practitioner may be liable for failing to warn a patient about the meaning of certain symptoms,<sup>22</sup> failing to exercise required care and skill in diagnosing and/or treating the patient<sup>23</sup> and failing to disclose the material risks associated with a certain procedure.<sup>24</sup>

The need for expert witnesses testifying in medical litigation has its origins in English common law.<sup>25</sup> *Slater v Baker & Stapleton*,<sup>26</sup> is quoted by Bal as the case that developed the concept of professional standard.<sup>27</sup> In this judgment, the court found that medical practitioners were to be judged by the rule of the profession as testified to by medical practitioners themselves.<sup>28</sup> After explaining the test for negligence in medical negligence cases, the court in *Van Wyk v Lewis*, explained that because the court is required to decide whether the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs was reasonable, the evidence of a qualified member of the branch of the profession was of the greatest assistance in estimating that

13 1924 EDL 37.

14 1914 AD 519 525.

15 *Van Wyk v Lewis* 444.

16 *Ibid.*

17 1966 2 SA 428 (A).

18 *Van Wyk v Lewis* 444.

19 1980 1 SA 191 (A).

20 *Blyth v Van der Heever* 196E.

21 *Buls v Tsatsarolakis* 1976 2 SA 8921 (T).

22 *Dube v Administrator, Transvaal* 1963 4 SA 260 (T).

23 *Buls v Tsatsarolakis*.

24 *Castell v De Greef* 1993 3 SA 501 (C).

25 Bal "The Expert Witness in Medical Malpractice Litigation" 2009 *Clin Orthop Relat Res* 383 384.

26 95 Eng. 860, 2 Wils. KB 359 1767.

27 Bal 2009 *Clin Orthop Relat Res* 384.

28 *Ibid.*

general level.<sup>29</sup>

Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court.<sup>30</sup> In *Schneider NO v Aspeling*,<sup>31</sup> the court correctly warned that an expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which the expert possesses. The expert is expected to provide the court with an objective and unbiased opinion, based on his or her expertise.<sup>32</sup> The court went further and agreed with Zeffertt and Paizes and the judgment in *National Justice Compania Navierasa v Prudential Assurance Co Limited*,<sup>33</sup> that the following are the duties of an expert witness in a trial:

1. Expert evidence presented to the Court should be, and should be seen, to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise ... An expert witness should never assume the role of an advocate;
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion;
4. An expert witness should make it clear when a particular question or issue falls outside his expertise;
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

Saner adds that in medical negligence cases, an expert further has the duty to give evidence as to the standards and practices in the healthcare field he/she is an expert on and explain whether in his/her opinion, what would have been the reasonable standard to adhere to in the circumstances.<sup>34</sup> Saner further explains that an expert witness may be called also to explain how a particular mechanism works, whether it be a technique, a mechanical device or a medical procedure.<sup>35</sup> More importantly, in a medical negligence case an expert witness will assist the court in coming to a conclusion on the questions of negligence and/or causation and, if required, of the quantum of damages.<sup>36</sup>

### 3 ASSESSMENT OF EXPERT EVIDENCE IN MEDICAL NEGLIGENCE CASES

#### 3.1 The Legal Position in England

In English law, two important tests have been devised and have the recognition and approval of the courts. These tests are the so-called *Bolam v Friern Hospital Management Committee*<sup>37</sup> and *Bolitho v City and Hackney Health Authority*<sup>38</sup> tests. However, they are not two separate tests and it is more accurate to speak of the *Bolam* test as modified by *Bolitho*. The *Bolam* test applies in medical testimony and was upheld for use in court on a number of occasions in the House of Lords.<sup>39</sup> The *Bolam* test states that, when assessing negligence, it allows for the difference in opinion between experts and that it is a sufficient defence to have the

<sup>29</sup> *Van Wyk v Lewis* 444.

<sup>30</sup> *Marc Bee v Road Accident Fund* 2001 3 SA 1188 (SCA) para 29.

<sup>31</sup> [2010] 3 All SA 332 (WCC) 332.

<sup>32</sup> *Schneider NO v Aspeling* [2010] 3 All SA 332 (WCC) 332.

<sup>33</sup> 1993 (2) Lloyd's Reports 68 at 81.

<sup>34</sup> *Saner Medical Malpractice in South Africa* (2018) 14.8.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> 1957 1 WLR 582.

<sup>38</sup> 1998 AC 232 (HL) (E).

<sup>39</sup> See *Maynard v West Midlands Regional Health Authority* 1984 W.L.R. 634; *Loveday v Renton* 1990 Med LR 117; *Joyce v Merton, Sutton and Wandsworth Health Authority* 1996 Med LR 381; and *Bolitho v City and Hackney Health Authority* 1998 AC 232 (HL) (E).

support of a reputable body of medical opinion, regardless of the size of that body.<sup>40</sup> The *Bolam* test is understood as having two elements and that, first, the expert evidence must be in accordance with the accepted standard proclaimed by peers in the field.<sup>41</sup> Secondly, where there are differing views, the defendant will escape liability if the conduct is within the range of acceptable practice at the relevant time.<sup>42</sup> It does not matter that the conduct is rejected by the majority of experts in the field.<sup>43</sup> Mulherson argues that the *Bolam* test was criticised in a number of occasions because it came to be interpreted to mean that the expert evidence was conclusive.<sup>44</sup>

However, this concern of interpreting the *Bolam* test to mean that the expert evidence was conclusive, was addressed in a number of judgments. In *Loveday v Renton*<sup>45</sup> a different approach was taken and it was clarified that the *Bolam* test should not be interpreted to mean that the expert evidence was conclusive. The court found that it was not sufficient to merely accept the expert evidence; the court had to evaluate the evidence, the reasons for the opinion and the extent to which the evidence is supported by other evidence.<sup>46</sup> The court must examine the expert evidence in order to determine whether it withstands analysis.<sup>47</sup> This meant that the court rejected the interpretation that the expert evidence was conclusive in terms of the *Bolam* test, the court had the discretion to decide whether to accept the expert evidence or not.

Where there is conflicting expert evidence, the court has the duty to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.<sup>48</sup> It is not sufficient that the court accepts the opinion of one expert over the other simply on the grounds that they have given their evidence confidently.<sup>49</sup> The court may reject the expert evidence and make its decision on the remainder of the evidence under any of the following circumstances:<sup>50</sup>

- (a) The expert's opinion is based on illogical or even irrational reasoning.
- (b) The expert's reasoning is speculative or manifestly illogical.
- (c) The evidence of the expert witness is so internally contradictory as to be unreliable.

The *Bolitho* test states that, in applying the *Bolam* test, where a professional opinion is not capable of logical analysis, the body of opinion is unreasonable or irresponsible, then the court must reject it.<sup>51</sup> This means that in *Bolitho v City and Hackney Health Authority*, the court

40 *Bolam v Friern Hospital Management Committee* 1957 1 WLR 582. On this issue the court found that: "I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view."

41 Teff "The Standard of Care in Medical Negligence—Moving on from Bolam" 1998 *Oxford Journal of Legal Studies* 476.

42 *Ibid.*

43 *Ibid.* See also *Maynard v West Midlands Regional Health Authority* 1984 W.L.R. 634 639, where the court found that: "I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary."

44 Mulherson "Trumping Bolam: A Critical Legal Analysis of Bolitho's 'Gloss'" 2010 *Cambridge Law Journal* 609 613.

45 1990 Med LR 117.

46 *Loveday v Renton* 125.

47 *Ibid.* See also *Joyce v Merton, Sutton and Wandsworth Health Authority* 1996 Med LR 381, where the court followed the approach of accepting that a conduct is accepted by a professional body of opinion provided the opinion stood up to the analysis and was not unreasonably held in light of the available knowledge at the time.

48 *Loveday v Renton* 125.

49 *Ibid.*

50 *Ibid.*

51 *Bolitho v City and Hackney Health Authority* 1998 AC 232 (HL) (E). The court made the following findings in addressing concerns on the *Bolam* test: "My Lords, I agree with these submissions to the extent that, in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J. stated [1957] 1 W.L.R. 583, 587, that the defendant had to have acted in accordance with the practice

developed the *Bolam* test into a two-step procedure. This requires the court to determine first, whether the conduct is in accordance with a practice accepted by a responsible body.<sup>52</sup> If yes, the practice must be responsible or logical taking into account the risks and benefits.<sup>53</sup> This approach has been endorsed in a number of judgments in English courts.<sup>54</sup> Mulherson points out that there are seven factors which the courts have identified in deciding whether the expert opinion is illogical and indefensible. The factors are:<sup>55</sup>

- (a) Where, as a matter of lay common sense the opinion overlooked that clear precaution to avoid the adverse outcome was available, the practice would be unreasonable and illogical. There must be an alternative course which could have easily and inexpensively avoided the outcome.
- (b) Where the scarcity of resources available impact directly on the outcome of the patient, the patient may not successfully rely on the *Bolitho* test even if the practice is illogical.<sup>56</sup>
- (c) Before accepting the body of opinion as logical and defensible, the court must be satisfied that the witness directed his/her mind to the comparative risks and benefits; and reached a defensible conclusion. The emphasis is on the process rather than on the result. The expert must have weighed all the factors relevant to the matter and considered the alternatives available.
- (d) Where the accepted opinion or practice contravenes widespread public opinion, the opinion will not be logical or reasonable.
- (e) Where the expert misinterprets the facts and base his /her opinion on such a mistake, the opinion will be found to be wanting in logical analysis.
- (f) The expert opinion must be internally consistent. This means that it must make cogent sense as a whole.
- (g) Where the opinion has been based on a wrong legal test, the opinion will be found also to be lacking in logical analysis. An example would be where the expert applies a standard lower than what is reasonable.

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accepted as proper by a 'responsible body of medical men'. Later, at p. 588, he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion'. Again, in the passage which I have cited from Maynard's case, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives responsible, reasonable and respectable—all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

<sup>52</sup> Mulherson 2010 *Cambridge Law Journal* 613.

<sup>53</sup> *Ibid.*

<sup>54</sup> See *Greenbank v Pickles* 2001 1 E.G.L.R. 1, where, after hearing valuation evidence, the court found abundant justification for the submission that an expert's evidence demonstrated a "confused, illogical and inconsistent" approach. Similarly, in *Wang Din Shin v Nina Kung* 2004 H.K.C.U. 730, an expert's discrepancies were considered by the judge to be too blatant to be dismissed as "natural variations". See also *French v Thames Valley Strategic H.A* 2005 EWHC 459 (Q.B.); *Robbins v London Borough of Bexley* [2013] EWHC Civ 1233 (17 October 2013); *Bell v Bedford Hospital NHS Trust (Rev 1)* [2019] EWHC 2704 (QB) (14 October 2019) and *Mordel v Royal Berkshire NHS Foundation Trust* [2019] EWHC 2591 (QB) (08 October 2019).

<sup>55</sup> Mulherson 2010 *Cambridge Law Journal* 620–636.

<sup>56</sup> See Mulherson 2010 *Cambridge Law Journal* 623. The author refers to *Garcia v St Mary's N.H.S Trust* 2006 459 (Q.B) as an example of the court's approach in this regard.

Where the court is faced with conflicting expert medical evidence, it would be wrong for the court to decide the matter based on whether it prefers the evidence of one of the experts, where both are capable of logical support.<sup>57</sup> In such cases the court cannot hold that the defendant is negligent.<sup>58</sup> Mulherson summarises the position regarding the application of the *Bolam/Bolitho* test as follows:

Nevertheless, as the House of Lords has frequently reiterated, it is not for the court to venture into a consideration of two contrary bodies of opinion and to decide a case on the basis of which, of the patient's and the doctor's expert medical opinion, it prefers. If the scenario is one that involves clinical judgment to which the *Bolam* test applies, and if the doctor does produce evidence that his practice was supported by such opinion, then, in the words of Sedley L.J., 'the judge or jury have to accept the opinion of a body of responsible practitioners, unless it is unreasonable [in the *Bolitho* sense]'.<sup>59</sup>

Mulherson further points out that there are other considerations which require the court not to limit its evaluation to determine whether there is a respectable body of medical opinion.<sup>60</sup> The court is still required to weigh up the evidence on both sides and may still prefer the evidence of one expert over the other.<sup>61</sup> Mulherson explains that the court should take into account the following principles when applying the *Bolam/Bolitho* test:<sup>62</sup>

- (a) The test applies only to matters of clinical or professional judgment. It must be an exercise of special skill or knowledge. The author recognises that although the test should apply only to exercise of special skill or knowledge, the English courts have applied the test in cases relating to hospital staffing levels, the nature of questions asked during medical triage and the nature of the communication between the medical practitioners and the patient.<sup>63</sup>
- (b) The test is limited to expert opinion and not matters of facts.
- (c) The expert witness's opinion does not represent the views of a responsible body within the profession.

Maclean, in analysing the effect of *Bolitho* and various judgments post-*Bolitho*,<sup>64</sup> concludes that there are three categories of medical negligence cases and the following approaches should be adopted:<sup>65</sup>

- (a) In cases where experts agree on the standard of care but where there is a conflict over the correct factual interpretation of the clinical evidence, the court should not apply the *Bolam/Bolitho* test but must decide the matter on the balance of probabilities. The court is free to choose the evidence of the other expert over the other and this will include assessing the credibility of the witnesses.
- (b) Where the experts agree on the standard of care and the factual interpretation of the clinical evidence, the court will only apply the *Bolam/Bolitho* test if one of the parties argues that the standard is illogical.
- (c) When there is a dispute on whether the conduct or practice accepted by a responsible body

57 *Bolitho v City and Hackney Health Authority*. See also *Maynard v West Midlands Regional Health Authority* and *Sidaway v Governors of Bethlem Royal Hospital* 1985 A.C. 871, where the court warned that when evaluating evidence, the court should not give effect to any preference it may have for one expert evidence over another when both views are accepted by a responsible body of professionals. The decision in *Sidaway* was later rejected in *Montgomery v Lanarkshire Health Board* 2015 SC 11; 2015 1 AC 1430, where the court found that the *Bolam/Bolitho* test did not apply in cases of failure to disclose the associated risks.

58 In terms of *Bolam* the defendant cannot be negligent if he/she is acting in accordance with practice accepted as proper by a responsible body even if there is a body of opinion who would take a contrary view.

59 Mulherson 2010 *Cambridge Law Journal* 614.

60 Mulherson 2010 *Cambridge Law Journal* 615.

61 *Ibid.*

62 *Ibid.*

63 See Mulherson 2010 *Cambridge Law Journal* 616. See also *Mellor v Sheffield Teaching Hospital N.H.S. Trust* 2004 EWHC 780 para 245, where the court found that early discharge of the witness was not a matter of exercising special skills or knowledge and therefore the test did not apply.

64 See *Marriott v West Midlands HA* [1999] Lloyd's LR Med 23, CA; *Pearce v United Bristol Healthcare NHS Trust* (1999) 48 B.M.L.R. 118; *Penney, Palmer and Cannon v E Kent HA* [1999] Lloyd's LR Med 123; *Wisniewski v Central Manchester HA* [1998] Lloyd's LR Med 223, CA; and *Briody v St Helen's and Knowsley AHA* [1999] Lloyd's LR Med 185, CA.

65 Maclean "Beyond Bolam and Bolitho" 2002 *Medical Law International* 205 221.

of opinion, Maclean states that there are three possibilities. First, the court may reject the evidence because the witness is not credible. Secondly, the court may accept both opinions as accepted by a responsible body or reject one as being illogical. Lastly, the court may find that both practices are accepted by a responsible body of opinion and they are logical. In the last instance, the court will find that the defendant is not liable for medical negligence.<sup>66</sup>

The *Bolam/Bolitho* test is not applicable in cases relating to failure to inform the patient of all the necessary risks.<sup>67</sup> In these cases the *Montgomery* test should be applied and it requires the consideration of whether a “reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to [risk not disclosed].”<sup>68</sup> The court noted that a patient is entitled to information as to a risk if he/she reasonably considers that its disclosure would be seriously detrimental to the patient’s health and he/she is further excused in cases of emergency or in cases of necessity.<sup>69</sup>

### 3.2 The Courts’ Approach in South Africa

The Supreme Court of Appeal had the opportunity to consider the matter regarding expert evidence in medical negligence cases and has provided guidance on how the civil court should evaluate conflicting expert medical evidence in medical negligence cases. In *Michael v Linksfield Park Clinic (Pty) Ltd*,<sup>70</sup> the court noted that the most important step in evaluating expert evidence is to determine whether the evidence is founded on logical reasoning.<sup>71</sup> The court must be satisfied that the expert has considered comparative risks and benefits and has reached a defensible conclusion.<sup>72</sup> This is in effect the application of the *Bolitho* test.<sup>73</sup> It is noted that there is no reference to the *Bolam* test in *Michael v Linksfield Park Clinic (Pty) Ltd*. No reference is made to the first leg of the *Bolam* test, which provides that the expert evidence must be in accordance with the accepted standard proclaimed by peers in the field. It is submitted that this may have been because in this case none of the experts were asked, or purported to express a collective or representative view of what was or was not accepted as reasonable in South African specialist anaesthetist practice in 1994.<sup>74</sup> There was no accepted standard proclaimed by peers in the field.<sup>75</sup>

Meintjes-Van der Walt argues that whether the expert has reached a defensible conclusion, requires that the expert evidence must exhibit internal consistency and logic.<sup>76</sup> An expert is not entitled to give hearsay evidence as to any fact and expert witnesses must rely on facts established during the trial, except facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established

<sup>66</sup> *Ibid.*

<sup>67</sup> *Montgomery v Lanarkshire Health Board* para 86, the court found that: “It follows that the analysis of the law by the majority in *Sidaway* is unsatisfactory, in so far as it treated the doctor’s duty to advise her patient of the risks of proposed treatment as falling within the scope of the *Bolam* test, subject to two qualifications of that general principle, neither of which is fundamentally consistent with that test. It is unsurprising that courts have found difficulty in the subsequent application of *Sidaway*, and that the courts in England and Wales have in reality departed from it; a position which was effectively endorsed, particularly by Lord Steyn, in *Chester v Afshar*. There is no reason to perpetuate the application of the *Bolam* test in this context any longer.”

<sup>68</sup> *Montgomery v Lanarkshire Health Board* para 87. The court made the following finding: “An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient’s position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.”

<sup>69</sup> *Montgomery v Lanarkshire Health Board* para 88.

<sup>70</sup> 2001 3 SA 1188 (SCA).

<sup>71</sup> *Michael v Linksfield Park Clinic (Pty) Ltd* para 36. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority* 1998 AC 232 (HL) (E).

<sup>72</sup> *Michael v Linksfield Park Clinic (Pty) Ltd* para 37.

<sup>73</sup> *Michael v Linksfield Park Clinic (Pty) Ltd* para 36.

<sup>74</sup> *Michael v Linksfield Park Clinic (Pty) Ltd* para 35.

<sup>75</sup> *Ibid.*

<sup>76</sup> Meintjes-Van der Walt “Decision Makers’ Dilemma: Evaluating Expert Evidence” 2000 *SA Journal of Criminal Justice* 319.

by admissible evidence.<sup>77</sup> In *Marc Bee v The Road Accident Fund*,<sup>78</sup> the court accepted the factual basis of the expert opinion has to be proved and the court must have regard to the cogency of the expert's process of reasoning. However, these principles are not applicable to instances where the evidence is uncontested and in such cases, the court is bound and entitled to accept expert evidence on agreed matters.<sup>79</sup>

When considering conflicting expert evidence what is required in the evaluation of the expert evidence is to determine whether and to what extent the experts' opinions are founded on logical reasoning.<sup>80</sup> It is only on that basis that a court is able to determine whether one of two conflicting opinions should be preferred.<sup>81</sup> An opinion expressed without logical foundation can be rejected.<sup>82</sup> The probative value of the evidence depends on the reasons provided by the expert witness.<sup>83</sup>

Endorsing the jurisprudence of the SCA in this regard, the Constitutional Court, in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*<sup>84</sup> found that when evaluating expert evidence the court must distinguish between the requirement that there be "logical reasoning" on the one hand, and, on the other, the requirement that evidence be generally accepted as a general medical norm. It was not acceptable to reject expert evidence because the opinion was not the medical norm, because there had not yet been enough opportunity to replicate or refute his findings especially if the evidence passes the reasonable and logical requirement for the acceptance.<sup>85</sup>

The court in *Medi-Clinic Ltd v Vermeulen*<sup>86</sup> cautioned that in the medical field it may not be possible to be definitive. Experts may legitimately hold diametrically opposing views and be able to support them by logical reasoning. In that event, it is not open to a court simply to express a preference for the one rather than the other, and on that basis to hold the medical practitioner to have been negligent. The court further cautioned that where a party acts in accordance with a reasonable and respectable body of opinion in the field, his/her conduct cannot be condemned as negligent merely because another equally reasonable and respectable body of opinion would have acted differently.<sup>87</sup> However, if a body of professional opinion overlooks an obvious risk which could have been guarded against, it will not be reasonable, even if it is almost universally held.<sup>88</sup> A party may be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis.<sup>89</sup> However, South African courts accept that only in very rare cases will the court conclude that views genuinely held by a competent expert and supported by a body of professional opinion, is unreasonable.<sup>90</sup> This is so because the assessment of medical risks is a matter of clinical judgment which requires expertise and the court would not normally be able to make a decision without expert evidence.<sup>91</sup>

77 *Mathebula v RAF* (05967/05) [2006] ZAGPHC 261 (8 November 2006) para [13]. See also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976 3 SA 352 (A) 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 2 SA 307 (A) 315E; *Lornadawn Investments (Pty) Ltd v Minister van Landbou* 1977 3 SA 618 (T) 623; and *Holtzhauzen v Roodt* 1997 4 SA 766 (W) 772I.

78 (093/2017) [2018] ZASCA 52 (29 March 2018) para 73.

79 *Ibid.* The court may still direct the parties to present evidence on their agreed facts, if it is not satisfied with the agreement.

80 *Medi-Clinic Ltd v Vermeulen* 2015 1 SA 241 (SCA) para 5.

81 *Ibid.*

82 *Ibid.*

83 *MEC for Health, Western Cape v Qole* (928/2017) [2018] ZASCA 132 (28 September 2018) para 37.

84 2016 1 SA 325 (CC); 2015 12 BCLR 1471 (CC).

85 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 1 SA 325 (CC); 2015 12 BCLR 1471 (CC) para 40.

86 2015 1 SA 241 (SCA).

87 *Michael v Linksfeld Park Clinic (Pty) Ltd* para 38.

88 *Ibid.*

89 *Medi-Clinic Ltd v Vermeulen* para 7.

90 *Michael v Linksfeld Park Clinic (Pty) Ltd* para 39.

91 *Ibid.*

It remains the decision of the court to decide, taking into account all the evidence, whether the evidence is correct and reliable; and whether it is grounded in facts.<sup>92</sup> The presiding officer is required to decide where the balance of probabilities lie and should not be tempted to focus on whether the expert's theory has been proven or not.<sup>93</sup> The presiding officer must evaluate the evidence and determine, first whether the expert opinion had a logical basis, and secondly, whether in forming his/her views, the expert witness directed his mind to the question of comparative risks and benefits; and whether the witness reached a defensible conclusion.<sup>94</sup> The evaluation of comparative risks and benefits requires that the expert explains why he supports the particular theory or technique and how this approach differs from the approach not followed.<sup>95</sup> Applying the test, the court in *Michael v Linksfeld Park Clinic (Pty) Ltd*, made the following statement:

What must be stressed in this case is that none of the experts was asked, or purported, to express a collective or representative view of what was or was not accepted as reasonable in South African specialist anaesthetist practice in 1994. Although it has often been said in South African cases that the governing test for professional negligence is the standard of conduct of the reasonable practitioner in the particular professional field, that criterion is not always itself a helpful guide to finding the answer. The present case shows why. Apart from the absence of evidence of what practice prevailed one is not simply dealing here with the standard of, say, the reasonable attorney or advocate, where the court would be able to decide for itself what was reasonable conduct. How does one, then, establish the conduct and views of the notional reasonable anaesthetist without a collective or representative opinion? Especially where the primary function of the experts called is to teach, with the opportunity only for part-time practice. In these circumstances counsel were probably left with little option but to elicit individual views of what the respective witnesses considered reasonable.<sup>96</sup>

However, taking into account these factors the choice or preference of one version over the other ought to be preceded by an evaluation and assessment of the credibility of the relevant witnesses,<sup>97</sup> their reliability<sup>98</sup> and the probabilities<sup>99</sup> of the expert evidence.<sup>100</sup> Recently, in *Life Healthcare Group (Pty) Ltd v Suliman*,<sup>101</sup> the court reiterated that the *Bolitho* test, as explained in *Michael v Linksfeld Park Clinic (Pty) Ltd*, was applicable to the evaluation of expert evidence in medical negligence cases and what is required is determining whether the expert opinion is founded on logical reasoning.

92 *Marc Bee v RAF* para 29.

93 *Michael v Linksfeld Park Clinic (Pty) Ltd* para 40. See also *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* para 38–40.

94 *Medi-Clinic Ltd v Vermeulen* para 25. See also *Louwrens v Oldwage*. In reaching this decision the court considered *Bolitho v City and Hackney Health Authority* and *Bolam v Friern Hospital Management Committee*. Meintjes-Van der Walt 2000 SACJ 334.

95 *Michael v Linksfeld Park Clinic (Pty) Ltd* para 35.

97 The court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. See *Stellenbosch Farmers' Winery Group Ltd. v Martell et Cie SA* 2003 1 SA 11 (SCA) para 5.

98 A witness's reliability will depend, apart from the factors mentioned *Stellenbosch Farmers' Winery Group Ltd. v Martell et Cie SA* at n 97 above (ii), (iv) and (v), on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof.

99 The court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are weighed the probabilities will prevail.

100 See *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* 2003 1 SA 11 (SCA), where the court found that: "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), as to (b), as to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c)."

101 2019 2 SA 185 (SCA) para 15.

The court also warned that judges must not accept too readily isolated statements by experts, especially in respect of a field where there is no medical certainty.<sup>102</sup> The court has the responsibility to weigh the evidence as a whole and it has the exclusive duty to make the final decision on such evidence.<sup>103</sup>

In the context of failure to disclose necessary information, the court in *Castell v De Greef*<sup>104</sup> concluded that a patient's consent would exclude the liability of the doctor, if the doctor warned the patient on the material risk inherent in the proposed treatment.<sup>105</sup> The court further explained that a risk is material if a reasonable person in the patient's position would likely attach significance to the information if warned of such; and the medical practitioner should reasonably be aware that the patient is likely to attach significance to the information if warned.<sup>106</sup> The court further warns that as much as expert evidence may be useful to determine the risks of the treatment and the materiality of the information, the court should not decide the matter based only on expert evidence.<sup>107</sup> What is important is whether the conduct conforms to the standard of reasonable care demanded by the law.<sup>108</sup> The Supreme Court of Appeal has applied the test in *Broude v McIntosh*<sup>109</sup> and *Louwrens v Oldwage*.<sup>110</sup> However, Thomas argues that the court in *Louwrens v Oldwage* did not apply the test, instead it applied the test in *Richter v Estate Hamman* which was heavily criticised and possibly rejected in *Castell*.<sup>111</sup> This clearly means that the *Bolitho/Linksfield* test is not applicable to cases of failure to disclose necessary information. Since the *Bolitho/Linksfield* test does not apply to cases of failure to necessary information, for the purpose of this article, it is not necessary to discuss this issue further.

### 3.3 The Legal Position in Singapore

In Singapore, section 47 of the Evidence Act,<sup>112</sup> regulates the admissibility of expert evidence in court. Section 47 allows for expert evidence on a point relating to scientific, technical or specialised knowledge, provided it is relevant to the facts.<sup>113</sup> The expert evidence must be based on training, study or experience.<sup>114</sup> The evidence is not irrelevant because part of the evidence relates to a matter of common sense, but it will be irrelevant if the court finds that it will not be in the interest of justice to treat the evidence as relevant.<sup>115</sup> Section 47 should be interpreted to be more inclusive and allowing the court to admit a wide range of expert evidence, while giving it the discretion to give evidentiary weight to such evidence.<sup>116</sup> Further, section 59(2) of the Evidence Act allows the court to take judicial notice of appropriate books

102 *Life Healthcare Group (Pty) Ltd v Suliman* para 15.

103 *Life Healthcare Group (Pty) Ltd v Suliman* para 15.

104 1994 4 SA 408 (C).

105 *Castell v De Greef* 427.

106 *Castell v De Greef* 427. This obligation is subject to the therapeutic privilege of the patient. The test endorses the decision in *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T), where the court found that: "[A] patient should be informed of the serious risks he does run. If such dangers are not pointed out to him then, in my opinion, the consent to the treatment is not in reality consent — it is consent without knowledge of the possible injuries. On the evidence defendant did not notify plaintiff of the possible dangers, and even if plaintiff did consent to shock treatment he consented without knowledge of injuries which might be caused to him."

107 *Castell v De Greef* 427.

108 *Ibid.*

109 1998 3 SA 60 (SCA), where the court found that the omission to inform the appellant of the risk of leakage of cerebrospinal fluid was of no significance. The leakage was not proved to be causally related to the onset of the facial palsy and the appellant did not claim that if the risk of leakage had been mentioned to him, he would have refused to consent to the operation. The appellant's evidence as to the alleged failure of the first respondent to inform him of the risk to the facial nerve and of the availability of the alternative operation (labyrinthectomy) was rejected by the trial Judge.

110 2006 2 SA 161 (SCA) para 22.

111 Thomas "Where to from *Castell v De Greef*? Lessons from Recent Development in South Africa and Abroad Regarding Consent to Treatment and the Standard of Disclosure" 2007 *SALJ* 188.

112 Cap 97, Rev Ed.

113 Section 47(1) of the Evidence Act.

114 Section 47(2) of the Evidence Act.

115 Section 47(3)–(4) of the Evidence Act.

116 Wong "Judging between Conflicting Expert Evidence: Understanding the Scientific Method and its Impact on Apprehending Expert Evidence" 2014 *Singapore Academy of Law Journal* 169 178

or documents on public history, literature, science or art.<sup>117</sup>

Wong points out that there are types of conflict that could arise in respect of expert evidence such as conflict (i) over assumed facts; (ii) over diagnosis or analysis of facts; (iii) over methods; and (iv) over theories.<sup>118</sup> Wong further points out that there are seven factors relied upon when assessing expert evidence in medical negligence cases.<sup>119</sup> These factors are:<sup>120</sup>

- (a) Professional qualifications are not necessary, but experience and expertise of the expert must be relevant to the subject matter in question. However, in the case of medical evidence, a professional qualification is a requirement.<sup>121</sup>
- (b) The expert must have personally clinically examined the patient.
- (c) Conclusive expert opinion is always accepted over inconclusive expert opinion.<sup>122</sup> The expert opinion must be precise and specific and the witness should avoid generalisations which are not supported by evidence.<sup>123</sup>
- (d) Evidence of lack of impartiality will reduce the weight of the expert opinion and in some cases it may lead to adverse inferences against the expert opinion.<sup>124</sup> Just because an expert is called by a party does not necessarily mean he/she would be biased in favour of that party, as experts owe a duty to the court.<sup>125</sup>
- (e) The opinion must be logical without internal inconsistency and it must be justified by the facts it is based on.<sup>126</sup>
- (f) The methodology used must not ignore factors which are material.
- (g) In cases of medical negligence, the court would apply the *Bolam/Bolitho* case.<sup>127</sup>

In *Dr Khoo James v Gunapathy d/o Muniandy*,<sup>128</sup> the court found that it did not possess the expertise to make decisions regarding medical negligence cases and rejected an interventionist approach because the court was of the opinion that it would lead to defensive medical practices. The court further accepted the *Bolam* test when assessing expert evidence in respect of a medical negligence case.<sup>129</sup> Although, the courts in Singapore purport to apply the *Bolam/Bolitho* test<sup>130</sup> as explained in English law, various scholars are of the view that the courts in Singapore incorrectly emphasise the *Bolam* test and ignore the *Bolitho* test.<sup>131</sup> For example, Amirthalingam argues that the jurisprudence based on the *Bolam/Bolitho* test, in Singapore, is unnecessarily conservative and the courts in Singapore have failed to relax the test; even when the courts in England have relaxed the test by modifying the *Bolam* test in

117 Wong 2014 *Singapore Academy of Law Journal* 179.

118 Wong 2014 *Singapore Academy of Law Journal* 179.

119 Wong explains these requirements as applicable to all cases, however the seventh requirement is only applicable to medical negligence cases.

120 Wong 2014 *Singapore Academy of Law Journal* 189.

121 Lo, Chin, Tay and Lai "Torn Fealty to the Courts and Science: Conundrums over Medical Expert Opinion" 2018 *Juris Illuminae* 1.

122 See also *Lim Chwee Soon v Public Prosecutor* 1996 3 SLR(R) 858 para 14. See also *Hii Chii v Ooi Peng Jin London Lucien* 2016 SGHC 21, where the court preferred the evidence of the expert because the evidence was convincing and responded to the evidence of the opposing expert witness.

123 Lo and others 2018 *Juris Illuminae* 1.

124 See *Vita Health Laboratories Pte Ltd v Peng Seng Meng* 2004 4 SLR(R) 162 para 80; *Pacific Recreation Pte Ltd v S Y Technology Inc* 2008 2 SLR (R) 491 para 70; and *JSI Shipping (S) Pte Ltd v Tefoongwongcloong* [2007] 4 SLR(R) 460 para 63.

125 Lo and others 2018 *Juris Illuminae* 1.

126 Some of these factors are similar to the factors considered for the *Bolam/Bolitho* test.

127 This specific application of the *Bolam/Bolitho* test is criticised on the following grounds: (a) The judge may not be any less adept in matters relating to medical science as compared to other disciplines which are also complex; (b) a presiding officer may obtain knowledge on the subject during the trial as is the case with other disciplines; (c) the *Bolam/Bolitho* test may be applied in cases not involving medical negligence; (d) the *Bolam/Bolitho* test will not apply to cases involving emerging and novel areas of medical speciality; and (e) there is no justifiable reason preventing the judge from applying the two-stage logic test in *Bolam/Bolitho*, in other fields of speciality. Wong points out that the requirements from (a) to (f) are applicable to assessment of expert evidence in cases other than medical negligence cases.

128 2002 1 SLR(R) 414.

129 *Dr Khoo James v Gunapathy d/o Muniandy* 2002 1 SLR(R) 414 para 3.

130 The Courts in Singapore refer to the test as the *Bolam* test with the *Bolitho* addendum.

131 Amirthalingam "Bolam Rules in Singapore and Malaysia-revisited" 2015 *SAC LJ* 666.

*Bolitho*, excluding the application of the *Bolam* test in cases relating to the duty to inform, and allowing the court to evaluate the expert evidence and decide whether the opinion is supported by other evidence as explained in *Loveday v Renton*.<sup>132</sup> Amirthalingam further argues that not only is the reliance on the test conservative, it also limits the discretion of the judiciary and for that reason alone it should be rejected.<sup>133</sup> Amirthalingam argues that what is problematic about the judgment in *Gunapathy* is that the effect of the judgment is that all that a court is permitted to do is to determine whether the expert witnesses have come to a logically defensible conclusion.<sup>134</sup> Therefore, a medical practitioner cannot be found liable even if the court believes the medical practice to be wholly unreasonable and even if it is shown that the medical practice is wrong.<sup>135</sup> This clearly indicates that the court ignored the *Bolitho* test and *Loveday v Renton*.

Sim argues that the “pro-doctor” approach taken in *Dr Khoo James v Gunapathy d/o Muniandy* is a departure from the *Bolam* test because there is scope of disagreement when it comes to medical evidence.<sup>136</sup> The *Bolam* test does not call the extent of judicial expertise in medical matters into question.<sup>137</sup> Sim argues also that while medical professionals are in the best position to testify on what is common medical practice, they are not more equipped than the courts to decide if the practice is a reasonable one.<sup>138</sup> Some of the issues regarding the proper standard of care are not limited to knowledge of medical science, but may require an appreciation of social, moral and political values of society.<sup>139</sup> Even though the court may still decide that the opinion of the witness is not reasonable, this will occur in very rare cases. The restrictive approach of the courts in Singapore amounts to a very narrow interpretation of the *Bolam/Bolitho* test, because judges are not permitted to determine the reasonableness of the medical opinion, a medical practitioner may be liable only when his/her view as represented by an expert was found by the court to be unreasonable.<sup>140</sup> This means that a court is permitted only to determine whether the expert witnesses of the defence have come to a logically defensible conclusion.

The courts in Singapore have adopted a similar approach on matters relating to failure to disclose the necessary information as the English courts. In *Hii Chii Kok v Ooi Peng Jin London Lucien*, the Singapore appeal court found that the *Bolam/Bolitho* test continues to apply when determining whether a doctor has been guilty of negligent diagnosis or treatment and the *Montgomery* test applies to determine whether a doctor was negligent in advising the patient.<sup>141</sup> However, the court modified the *Montgomery* test and concluded that a three-stage approach should be adopted as follows:<sup>142</sup>

- (a) Was the information material from the perspective of a reasonable patient in a particular patient’s position? Alternatively, was it information which would have been considered relevant and material by that particular patient for individual-specific reasons of which the doctor knew or should have known? This requires the court to consider whether such information should have been disclosed or not.<sup>143</sup>
- (b) Was the information available to the doctor?<sup>144</sup>
- (c) Did the doctor reasonably withhold material information within the doctor’s knowledge? Possible scenarios where withholding information might be justified included cases

132 Amirthalingam “Judging the Doctors and Diagnosing the Law: *Bolam* Rules in Singapore and Malaysia” 2003 *Singapore Journal of Legal Studies* 125. See para 3.1 above on how the *Bolam* test was modified first in *Loveday v Renton* and by the *Bolitho* test. See also Mulherson 2010 *Cambridge LJ* 615, where the author explains that the test is limited to matters of clinical or professional judgment; and expert opinion and not facts.

133 Amirthalingam 2003 *Singapore J of Legal Studies* 125.

134 Amirthalingam 2003 *Singapore J of Legal Studies* 137.

135 *Ibid.*

136 Sim “*Dr Khoo James & Anor. v Gunapathy d/o Muniandy and Another Appeal: Implications for the Evaluation of Expert Testimony*” 2003 *Singapore Journal of Legal Studies* 601 604.

137 *Ibid.*

138 *Ibid.*

139 *Ibid.*

140 Amirthalingam 2003 *Singapore J of Legal Studies* 137.

141 2017 SGCA 38.

142 *Hii Chii Kok v Ooi Peng Jin London Lucien*.

143 Menon and Chuan “Singapore Modifies the U.K. *Montgomery* Test and Changes the Standard of Care Doctors Owe to Patients on Medical Advice” 2018 *Bioethical Inquiry* 181.

144 Menon and Chuan 2018 *Bioethical Inquiry* 183.

of emergency or cases where giving the patient the information could cause him significant harm. The court must be satisfied that the patient was suffering from such an affliction that he/she was likely to be harmed or harm him/herself after the relevant information was disclosed.<sup>145</sup>

This was a departure from previous cases where the courts applied the *Bolam/Bolitho* test to cases of failure to disclose the necessary information.<sup>146</sup> Singapore has definitely adopted the *Bolam/Bolitho* test in respect of matters relating to diagnosis or treatment, but in respect of failure to disclose information, the courts have adopted a modified *Montgomery* test.

#### 4 CONCLUSION

This article considers the approach of civil courts in evaluating conflicting expert medical evidence in medical negligence cases. A survey of case law in the Republic of South Africa, England and Singapore was conducted. These jurisdictions purports to share the same approach as it is based on the *Bolam/Bolitho* test. However, the courts in Singapore have adopted a different approach to the *Bolam/Bolitho* test as compared to the courts in South Africa and England.

South Africa and England have adopted a similar approach to the *Bolam/Bolitho* test. Both jurisdictions accepts that the test requires the courts to determine whether the practice is accepted by a responsible body and whether the expert opinion is capable of logical analysis and support. The courts in South Africa and England have also expressed that it is necessary to consider how the competing sets of evidence stood in relation to one another, viewed in the light of probabilities. The court will not reject the evidence merely because another equally reasonable and respectable body of medical opinion would have acted differently. In cases involving the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter. The weight of the expert witness' opinion will depend on the reasons given for such opinion.

Although the court in *Michael v Linksfield Park Clinic (Pty) Ltd* does not mention the *Bolam* test, the test was explicitly accepted in *Medi-Clinic Limited v Vermeulen*.<sup>147</sup> The fact that the *Bolam* test was not considered in *Michael v Linksfield Park Clinic (Pty) Ltd* is an indication that South African courts do not blindly apply the *Bolam/Bolitho* test. The approach in *Michael v Linksfield Park Clinic (Pty) Ltd* was necessary because in this case there was no accepted standard proclaimed by peers in the field. Asking whether the expert opinion was an accepted standard proclaimed by the peers in the field would not have assisted in this case. This is further an indication that South African courts will not place much emphasis on the *Bolam* test when there is no accepted standard proclaimed by peers in the field. A similar approach was adopted in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape*. It is submitted that this departure from the *Bolam/Bolitho* test is acceptable and is the only variation of the test as applied by English courts. Where there is a collective view shared by peers in the field, English courts and South African courts apply the same test.

Singaporean courts have placed more emphasis on the *Bolam* test and have been reluctant to apply the *Bolitho* test. The courts in this jurisdiction have taken a pro-doctor approach, which ignores that even when applying the *Bolam* test, the court is still required to consider whether the expert evidence can withstand logical analysis.<sup>148</sup> Commentators also argue that the rigid application of the test undermines the discretion of the courts. They further correctly argue that the appeal court has misapplied the *Bolam* test, as the test was never intended to question the judicial expertise in medical negligence matters. The other criticism on the interpretation of the *Bolam/Bolitho* test in Singapore is the fact that the court is permitted only to determine whether the expert witnesses have come to a logically defensible conclusion. Further a medical practitioner cannot be found liable even if the court believes the medical practice to be wholly unreasonable and if it is shown that the medical practice is wrong. Even

<sup>145</sup> *Ibid.*

<sup>146</sup> Thirumaran "The Disclosure of Medical Risks in Singapore and the Case of *Montgomery*" 2016 *Singapore Law Review* 1.

<sup>147</sup> See *Medi-Clinic Limited v Vermeulen* para 6.

<sup>148</sup> *Loveday v Renton* 125.

if we assume that the Singaporean approach deliberately excludes the *Bolitho* test and the courts only apply the *Bolam* test. This pro-doctor interpretation cannot be accepted as a correct application of the *Bolam* test. First, in *Loveday v Renton* and later in *Bolitho*, this rigid pro-doctor interpretation of *Bolam* was rejected.

In England and South Africa, courts have correctly taken a more relaxed approach in applying the *Bolam/Bolitho* test and they have attempted to limit the application of the test in certain cases. England and South Africa have also been very clear that the court has the discretion to decide to accept the expert opinion and the evidence should always be judged taking into account all the evidence presented in the matter. The courts are also required to take into account the credibility of the witness. The choice or preference of one version over the other ought to be preceded by an evaluation and assessment of the credibility of the relevant witnesses, their reliability and the probabilities of the expert evidence. It is clear that the South African and English approach is the correct interpretation of the *Bolam/Bolitho* test and the rigid and conservative interpretation of the *Bolam* test cannot be accepted.

In all the three jurisdictions the courts do not apply the *Bolam/Bolitho* principle to cases relating to failure to disclose material information. In England, the courts have adopted the *Montgomery* test. Singapore has adopted a modified *Montgomery* test and South Africa has followed the decision in *Castell v De Greef*. However, the Singaporean court only rejected the *Bolam/Bolitho* test in cases of failure to disclose material information in 2017, after the appeal court found that the test should not apply to such cases.<sup>149</sup>

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149 See *Hii Chii Kok v Ooi Peng Jin London Lucien* 2017 SGCA 38.